

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA)
)
)
vs.) **CRIMINAL NO. 99-00074-WS**
)
)
JUAN MUZA,)
)
)
Defendant.)

ORDER

This matter is before the Court on the defendant's "petition for writ of audita querela." (Doc. 206). Through this device, the defendant seeks to establish that his conviction was unconstitutionally obtained and his sentence unconstitutionally imposed because he was rendered ineffective assistance of counsel in violation of the Sixth Amendment.

"[W]e hold that a writ of audita querela may not be granted when relief is cognizable under § 2255." *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005). When the defendant's filing collaterally attacks a conviction or sentence as unconstitutional, relief is cognizable under Section 2255. *Id.* Because the defendant's petition does precisely that, the Court may not entertain the petition as one for writ of audita querela.

Because the defendant is proceeding pro se, the Court may construe his petition as a motion to vacate under Section 2255. *Holt*, 417 F.3d at 1175. The defendant, however, has already pursued a Section 2255 motion. (Doc. 150). That motion was denied, (Doc. 174), and the Eleventh Circuit denied the defendant's motion for a certificate of appealability. (Doc. 183).

"A second or successive motion [to vacate] must be certified as provided in section 2244 by a panel of the appropriate court of appeals...." 28 U.S.C. § 2255. The petitioner must seek and obtain this certification "[b]efore a second or successive application ... is

filed in the district court" *Id.* § 2244(b)(3)(A). "Failure to petition [the court of appeals] for permission to file a successive § 2255 motion leaves the district court without jurisdiction to rule on the successive § 2255 motion and the motion should be dismissed." *Lazo v. United States*, 314 F.3d 571, 574 (11th Cir. 2002), *vacated on other grounds*, *Gonzalez v. Secretary*, 326 F.3d 1175 (11th Cir. 2003), *superseding opinion*, 366 F.3d 1253 (11th Cir. 2004) (en banc); *accord* Section 2255 Rule 4(b)(when the motion on its face reflects "that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal").

Accordingly, the defendant's petition for writ of audita querela, construed as a motion to vacate, is **dismissed**.

DONE and ORDERED this 4th day of September, 2009.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE